

# United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Philip G. Reinhard	Sitting Judge if Other than Assigned Judge	P. Michael Mahoney
CASE NUMBER	02 C 50254	DATE	12/2/2003
CASE TITLE	Hedberg vs. Barnhart		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

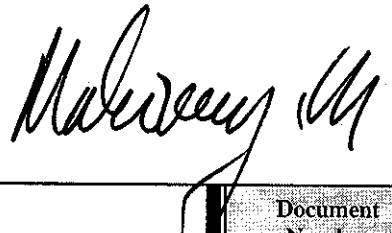
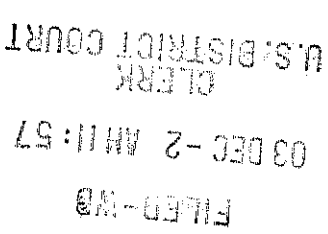
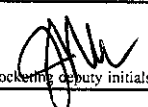
## MOTION:

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## DOCKET ENTRY:

- (1) ☐ Filed motion of [ use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due \_\_\_\_.
- (3) ☐ Answer brief to motion due \_\_\_\_\_. Reply to answer brief due \_\_\_\_\_.
- (4) ☐ Ruling/Hearing on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (7) ☐ Trial[set for/re-set for] on \_\_\_\_\_ at \_\_\_\_\_.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to \_\_\_\_\_ at \_\_\_\_\_.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]  
☐ FRCP4(m)    ☐ General Rule 21    ☐ FRCP41(a)(1)    ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] For the reasons stated on the attached Report and Recommendation, it is the recommendation of the Magistrate Judge that Hedberg's Motion for Fees be granted in part and denied in part. The court recommends Hedberg receive attorney's fees in the amount of \$4234.72.

- (11) ☒ [For further detail see order attached to the original minute order.]

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<input checked="" type="checkbox"/>	Notices mailed by judge's staff.		
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<div style="display: flex; justify-content: space-between;"> <div>sp</div> <div>courtroom deputy's initials</div> </div>		<div style="text-align: center;">  </div>	<div style="text-align: center;"> <div>number of notices</div> <div>DEC 02 2003</div> <div>date docketed</div> <div></div> <div>docketing deputy initials</div> <div>12/1/2003</div> <div>date mailed notice</div> <div>sp7</div> <div>mailing deputy initials</div> </div>

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**Philip G. Reinhard**  
**P. Michael Mahoney**

Hedberg filed for DIB on May 13, 1994 and again on October 10, 1997, claiming that she

was unable to work due to lipodystrophy, diabetes and heart problems. This action comes from Hedberg's second DIB application. Hedberg's application was denied initially and on reconsideration. She filed and received a hearing before an ALJ, but the ALJ denied her claim. Following a denial of benefits, Hedberg filed an action seeking judicial review pursuant to 42 U.S.C. § 405(g). Hedberg argued, *inter alia*, that the vocational expert's testimony and the ALJ's residual functional capacity determination at Step Five do not coincide. This court recommended summary judgment for Hedberg. On July 14, 2003, the district court adopted this court's recommendation, entered judgment for Hedberg and remanded the case.

### **Discussion**

Under the EAJA, Hedberg is entitled to fees if: 1) she is a prevailing party; 2) the position of the United States was not "substantially justified;" 3) no special circumstances exist that would make an award unjust; and 4) a fee application is submitted within thirty days of the final judgment in the action. 28 § U.S.C. 2412(d)(1); *see also Banks v. Barnhart*, No. 01 C 382, 2003 WL 22019796, at \*1 (N.D. Ill. Aug. 26, 2003). The Commissioner does not dispute that Hedberg is the prevailing party or that the application was timely filed. Rather, the only issue is whether the Commissioner's position was "substantially justified."

The fact that the Commissioner did not prevail creates no presumption in favor of awarding fees. *Marcus v. Shalala*, 17 F.3d 1033, 1036 (7th Cir. 1994). Rather, the Commissioner bears the burden of showing that the government's position was "substantially justified." *Cummings v. Sullivan*, 950 F.2d 492, 495 (7th Cir. 1991). Substantial justification is demonstrated when the government's position is ground in "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts

alleged and the legal theory advanced.” *Elster v. Barnhart*, No. 01 C 4085, 2003 WL 21799938, at \*1 (N.D. Ill. July 29, 2003)(quoting *United States v. Hallmark Construction Co.*, 200 F.3d 1076, 1078 (7th Cir. 2000)).

A. *Attorney’s Fees*

In this court’s previous report and recommendation, this court found that the ALJ’s decision to deny benefits to Hedberg was not supported by substantial evidence. Specifically, at Step Five, this court stated that “it is hard to understand how the ALJ’s RFC of Plaintiff could contain a limitation that Plaintiff can only work in jobs that allow her to change positions every hour” and “did not include some mention that Plaintiff must elevate her feet at various points throughout the day.” *Hedberg*, 2003 WL 21418361, at \*16. Hedberg and her treating physician, Dr. Diamond, both testified that Hedberg needed to elevate her feet daily. It is because of these findings, that the court now concludes that the Commissioner was not substantially justified.

According to the ALJ, Dr. Diamond had seen Hedberg for “many years” and on a “fairly regular basis.” Despite the above, the ALJ completely ignored Hedberg’s testimony, Dr. Diamond’s assessment, and the medical records, and instead focused on non-treating physicians and Hedberg’s ambiguous daily activities. The vocational expert indicated that a hypothetical person with Hedberg’s limitations who had to lift their legs coffee table height intermittently throughout the day would not be able to perform any jobs. This court finds that the Commissioner was not substantially justified in supporting the ALJ’s conclusion.

B. *Reasonableness of Fees*

Having determined that Hedberg is entitled to attorney’s fees, this court turns to whether the fees requested are reasonable. Hedberg requests \$4,839.15 in fees and expenses, representing

34.5 hours of work at ranges of \$50.00 an hour to \$147.48 an hour. The EAJA provides a statutory cap of \$125 per hour on attorney's fees that this court may increase if justified by an increase in the cost of living or special factors. *See* 28 U.S.C. § 2412(d)(2)(A). Other courts in the Northern District of Illinois have found that a "Plaintiff calculates his attorneys' hourly fees by adjusting the statutory figure upward on a month by month basis linked to increases in the cost of living index since March of 1996 when the EAJA was last amended." *Banks*, 2003 WL 22019796, at \*5. Hedberg's hourly rate for attorney's fees appears appropriately calculated.

Hedberg has the burden of proving that her fee request is reasonable and to support it with documentation. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Hedberg has provided a detailed time sheet of attorney Gregory Tuite with her motion. This time sheet includes the billing of Mr. Tuite and what appears to be his paralegal. The Commissioner disputes some of Mr. Tuite's individual entries. Specifically, the Commissioner asserts that Mr. Tuite's request for one hour to review the Commissioner's three page answer, as well as his request for one hour to prepare and file his one-page written status report and .50 hours to review Defendant's one-page written status report are excessive. (Comm'r at 6). Additionally, the Commissioner argues that Mr. Tuite's request for one hour to review the Commissioner's motion for extension of time appears to be excessive as does Mr. Tuite's request for .50 hours to review Defendant's one-page letter of August 6, 2002 appointing new counsel. (*Id.*). Finally, the Commissioner argues that Mr. Tuite's fee request should also be reduced to the extent he asks to be compensated at the attorney rate for work that is primarily clerical in nature. (*Id.* at 6-7).

In response, Mr. Tuite argues that "[w]hile some activities appear to be clerical in nature, we contend that overall the time submitted is reasonable." (Pl.'s Reply at 3). Mr. Tuite further

argues that there are many aspects of operating a law office, such as obtaining the document by mail, distributing the mail to the appropriate person, having that person review the document, attorney review, preparation and discussion with client, that dictate the fees submitted are reasonable. (*Id.*)(citing *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 553 (7th Cir. 1999)(stating that a court should disallow time spent on essentially clerical or secretarial tasks)). While this court does not disagree with Mr. Tuite's assessment of the many aspects of a law office, this court nevertheless reduces the number of hours on certain entries and the amount billed on certain entries.

With regards to Mr. Tuite's entries, this court reduces the following to .25 hours billed:

1. 6/13/02      Review of Appeals Counsel Denial
2. 8/6/02      Review letter regarding new counsel for Defendant
3. 8/23/02     Review Defendant's Motion for Extension of Time
4. 9/26/02     Review Defendant's Motion for Extension of Time
5. 4/3/03      Prepare and File Plaintiff's Status Report
6. 4/4/03      Review Defendant's Status Report

The court additionally reduces the following entries to \$50.00 a hour (Mr. Tuite's apparent billing rate for his paralegal):

1. 6/25/02      Issuance of Summons
2. 7/19/02      Correspondence to Court with proof of service

That reduces the fees to \$4234.72 for 31 hours of work.

### **Conclusion**

For the above stated reasons, it is the Report and Recommendation that Hedberg's Motion for Fees be granted in part and denied in part. The court recommends Hedberg receive attorney's fees in the amount of \$4234.72. The parties are given ten days from service of the Order, as calculated under Rule 6, to appeal to Judge Philip G. Reinhard, pursuant to Rule 72 of

the Federal Rules of Civil Procedure.

ENTER:

A handwritten signature in black ink, appearing to read "P. Michael Mahoney", written over a horizontal line.

P. MICHAEL MAHONEY, MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

DATE:

12/3/03